SHIN YANG QUARRY SDN BHD

v.

PUSAKA KTS FORESTS PLANTATION SDN BHD

HIGH COURT SABAH & SARAWAK, SIBU
RHODZARIAH BUJANG JC
[SUIT NO: 22-16-2009]
13 JULY 2009

CIVIL PROCEDURE: *Action - Injunctive relief - Injunctive relief against obstruction of usage on access road - Whether Director of Forests had power to grant plaintiff right of way over licensed area - Whether decision of Director of Forests fair and reasonable - Defendant's insistence on exclusive use and occupation of land - Whether without basis*

PUBLIC AUTHORITIES: *Remedies - Challenge on legality of decision of Director of Forests - Whether should have been proceeded by way of judicial review - Principle in O'Reilly v. Mackman - Rules of natural justice*

The defendant was a holder of two licenses for planted forests ('LPF') and the plaintiff was a holder of a quarry licence. The quarry was situated within the licensed areas of the defendant. The plaintiff applied, by a letter dated 10 December 2008, to the Director of Forests for access road and right of way through the defendant's licensed area. By a letter dated 14 January 2009, the Director gave his approval to the plaintiff. Upon assertion of this right, the defendant denied the plaintiff the use of the said road which led to the filing of the suit action for, *inter alia*, injunctive relief against further obstruction by the defendant of their usage of the said road. The defendant filed their defence to this claim contending, *inter alia,* that the Director of Forests had no power to give the plaintiff a right of way over their licensed areas.

Held:

(1) The defendant's challenge on the legality of the decision of the Director of Forests in granting the right of way should have proceeded by way of judicial review to quash the decision of the Director of Forests based on the principle in *O' Reilly v. Mackman*. It would be terribly unjust for this court to decide on the legality of the decision of the Director of Forests

A without giving the man the right to be heard. To do otherwise would be to condemn him *in absentia* and that would be breaching the rules of natural justice. (paras 6 & 9)

(2) The defendant's right to exclusive use and occupation of the B licensed areas was not an unalienable right to the land and it was subject to that of the state for clearly the licensed areas were state land. The state authority had deemed it fit to issue a quarry license to the plaintiff and one could not expect the quarry operation in the licensed areas to be conducted without C any road access. The decision of the Director of Forests to allow access to the quarry through the defendant's land was not unlike the granting of a right way into a landlocked piece of land - the rationale simply was one of a justice to the owner of the landlocked land for without it the owner's land D would be completely useless. The same went for the plaintiff in this case. (para 18)

(3) The Director of Forests in his letter granting the permission to the plaintiff to build the road was being fair and reasonable. E He had said the defendant could use the road also. The defendant themselves admitted that the people of Belaga in that area was also using the road. The decision of the Director of Forests was made for the greater good of the greatest number of people, a principle of jurisprudence which F should be upheld in this case. Thus, the defendant's insistence on an exclusive use and occupation of the land to the exclusion of the plaintiff was without basis. (paras 18 & 19)

[Order accordingly.]

G **Case(s) referred to:**

Badiaddin Mohd Mohidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(dist)***

Eu Finance v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(refd)***

O'Reilly v. Mackman [1982] 3 All ER 1124 ***(refd)***

Shaharuddin Ali & Anor v. Superintendent of Lands And Surveys Kuching H *Division & Anor [2004] 4 CLJ 775 HC* ***(refd)***

TR Rumah Lampoh Dana & Ors v. Government of Sarawak [2005] 8 CLJ 705 HC ***(refd)***

YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener) [2009] 4 CLJ 253 FC I ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14A, O. 15 r. 16, O. 53
Land Code (Cap 81) (Sarawak), s. 13(6)
Specific Relief Act 1950, s. 41
The Forests (Planted Forests) Rules 1997, rr. 10(1), 22

For the plaintiffs - Hii Kwong Kiing; M/s Hii & Hii Advocates
For the defendant - George Lo; M/s George Lo & Partners Advcoates
For the co-defendant - Tan Thiam Teck

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JC:

[1] By way of an introduction, the following facts, undisputed, are laid out as follows:

[2] The defendant is a holder of two Licences for Planted Forests ("LPF") issued by the Director of Forests on 8 December 1998. The plaintiff, on the other hand, is a holder of a quarry licence dated 11 October 2007 granted by the Superintendent of Lands and Surveys. The quarry is situated within the licensed areas of the defendant. The plaintiff applied, by a letter dated 10 November 2008 to the Director of Forests for access road and right of way through the defendant's licensed areas. (The defendant claimed to have no knowledge of such application.) By a letter dated 14 January 2009, the director gave his approval to the plaintiff "to construct and maintain a road to serve as access/ right-of-way to quarry Licence No. BD/02/2007 ... passing through the licensed area ... subject to the condition that these LPF holders will be allowed free use of this road".

[3] Based on the permission given, the defendant duly constructed the said road which the plaintiff finds extremely offensive and a violation of their exclusive right to occupation and use of the licensed areas. Upon assertion of this right, the defendant has denied the plaintiff the use of the said road which led to the filing of this suit action for, *inter alia*, injunctive relief against further obstruction by the defendant of their usage of the said road. The defendant has filed their defence to this claim contending, *inter alia*, that the Director of Forests has no power to give the plaintiff a right of way over their licensed areas.

[4] This defence has been translated into an application of its own; made by the defendant under O. 14A of the Rules of the High Court 1980 ("RHC 1980") in which the defendant asked that the court determine this question of law, *viz*:

> Whether the Director of Forests Department has the power to grant to the plaintiff a Right of Way over the Defendant's Licensed areas under License of Planted Forests No. LPF/0012 and LPF/0013 ("LPF Licenses") when the LPF Licenses and the law confer upon the Defendant the exclusive right to occupy and use the Licensed areas.

The Grounds Of The Application

[5] Primarily it rests on the clauses in the Licences granted to the defendant and in particular, to s. 3(1) thereof as well as r. 10(1) and r. 22 of The Forests (Planted Forests) Rules 1997. I need not reproduce these provisions but suffice for me to say that all three provide that the licence holder has the exclusive use and occupation of the licensed areas. The defendant also relied on s. 13(6) of the Sarawak Land Code (Cap. 81) but upon reading that section, my view is that it does not support the defendant's case of exclusive use and occupation of the licensed areas as it talks about the alienation of state land where a LPF has been issued. The giving of the right of way does not tantamount, in my opinion, to alienating the land in favour of the plaintiff.

[6] The plaintiff has resisted this application on the ground that the defendant's application being in substance a challenge on the legality of the decision of Director of Forests in granting the right of way, it should have proceeded by way of judicial review to quash the decision of the Director of Forests based on the principle in *O'Reilly v. Mackman* [1982] 3 All ER 1124. The defendant however submitted that the course of action they have taken is still open to them by virtue of the Federal Court's latest decision in *YAB Dato' Dr Zambry Abd Kadir & Ors v. YB Sivakumar Varatharaju Naidu; Attorney-General Malaysia (Intervener)* [2009] 4 CLJ 253 (a still unreported decision at the time of writing this decision). For brevity, I would refer to this decision as *Dato' Zambry*'s case.

Dato' Zambry's Case

[7] I do not see the need to lay out the facts in this cited case for it is of such prominence and gathered so much intense publicity that not only legal practitioners but laymen alike are

familiar with its facts. Learned counsels for both the plaintiff and the defendant have made extensive quotations in their submissions on what was said by the Federal Court respecting the issue of whether a decision (which should properly be the subject matter of judicial review) could be challenged in suit action filed for declaratory reliefs.

[8] I do not propose to go into the details of the said judgment but suffice for me to say that even though the Federal Court have stated that the remedy of declaratory reliefs provided under s. 41 of the Specific Relief Act 1950 read with O. 15 r. 16 of the RHC 1980 and that of *certiorari* under O. 53 of the RHC 1980 are "alternatives and mutually not exclusive" it does not, I am afraid, lay down an all encompassing rule to say that a challenge to a decision which is a subject matter of a judicial review can be mounted in an action for a declaratory relief. The Federal Court in my view did not jettison the principle established in *O'Reilly's* case (*supra*). The statement made by the Federal Court about the two remedies being "mutually not exclusive" refers purely to the existence of **exceptions** to the principle in *O'Reilly*'s case (*supra*) which allows both remedies being applied for in a single action for declaratory reliefs and some of the exceptions are laid out in the said judgment but the categories of these exceptions are not closed. I say this because even Lord Diplock himself when formulating the principle in *O'Reilly*'s case said that "... **there may be exceptions**, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law or where none of the parties object to the adoption of the procedure by writ or originating summons. Whether there should be **other exceptions** should, in my view, at this stage in the development of procedural public law, **be left to be decided on a case to case basis** ...". (emphasis added.)

[9] The defendant has not in my view brought himself within the exceptions already established or a fresh one which I could consider. In my view, their case in fact falls squarely within the principle established in *O'Reilly*'s case. It would be terribly unjust for me to decide on the legality of the decision of the Director of Forests without giving the man the right to be heard. To do otherwise would be to condemn him in absentia and that would be breaching the rules of natural justice.

[10] Further, in my view, *Dato' Zambry*'s case (*supra*) must be read in the particular context of the facts in that case - which was a challenge made against the decision of a Speaker of the Legislative Assembly of Perak. The Federal Court at p. 256 of their judgment, quoting Lord Woolf in the 2nd Edition of The Declaratory Judgment clearly said that "in cases of this nature the appropriate form of relief is by way of declaration". In the quoted text from Lord Woolf, it is further stated that the courts are "acutely sensitive not to impinge on the jurisdiction and sovereignty of Parliament ..." and that "declaration will often be the only remedy they will be willing or able to grant ...". His Lordship also said that "Prerogative remedies and injunctions are unsuitable, and almost certainly unavailable, to control parliamentary proceedings ...".

[11] Thus, the Federal Court acknowledged that judicial review of the Speaker's decision is not an option open to them in the said case. The plaintiff's counsel has also pointed out and to which I agree that there is a distinguishing feature of *Dato' Zambry*'s case (*supra*) with their case in that Dato' Zambry and the other six assemblymen of Perak State Assembly were not seeking for a review of the decision of the Speaker, which was made clear from the stand adopted by the applicants through their counsel and specifically in the judgment, Puan Azizah binti Haji Nawawi from the Federal Attorney-General's Chambers was said to have submitted to the court that the applicants were only having their legal rights asserted.

[12] In this case before me, the defendant is not merely asking the court to declare that they have an exclusive use and occupation of the licensed areas but that the decision of the Director of Forests was bad in law. The attack against the decision of the Director of Forests whether one would term it as a collateral or direct and frontal attack constitutes the only defence to the plaintiff's claim. Their counsels have candidly admitted before me at the hearing that their case rise and fall with the legality of the Director's decision.

[13] Given these particular facts of the case, I am again in agreement with counsel for the plaintiff that the decision of *Shaharuddin bin Ali & Anor v. Superintendent of Lands And Surveys Kuching Division & Anor* [2004] 4 CLJ 775 HC and that of *TR Rumah Lampoh Dana & Ors v. Government of Sarawak* [2005] 8 CLJ 705 HC are a more appropriate guide for me to follow.

These cases have decided, following *O'Reilly's* case (*supra*) that where the plaintiffs sought to declare that they have customary rights over the land, they must first quashed the decision of the Minister for Planning & Resources Management giving direction to extinguish the plaintiffs' native customary rights over the said land before the court can grant them the declaration they sought in their suit action.

[14] In making these decisions both Datuk Clement Skinner J and Dato' Abdul Aziz bin Abdul Rahim J, respectively, have reasoned out why this be so and in all humility I say that I have nothing more useful to add to their reasonings. What I wish to say, however, and it would be amiss for me not to do so, would be to distinguish the defendant counsel's reliance on two cases, ie, *Eu Finance v. Lim Yoke Foo* [1982] 1 LNS 21 FC and *Badiaddin Mohd Mohidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 FC.

[15] In respect of *Eu Finance*'s case, it must be noted that the case was reported the same year as O'Reilly's and it would not be wrong for me to assume that when *Eu Finance*'s case was decided, *O'Reilly*'s case was not in contemplation of the Federal Court at all because the decision of the Federal Court was made in March 1982 and that of *O'Reilly*'s was only made in November 1982. I am stating the obvious when I said that *O'Reilly*'s case has found acceptance by all tiers of courts in Malaysia and therefore it is that case which I should follow and not *Eu Finance*'s case.

[16] As for *Badiaddin*'s case (*supra*) I agree with the plaintiff counsel's submission that since it concerns a court order which was said to be null and void, it is completely distinguishable from an administrative decision for obviously, again, judicial review of that court order is a legal impossibility.

Merits Of The Application

[17] Assuming I was wrong in my reasonings above and that the application of the defendant was rightly brought before me, I would answer the question of law that they framed in the negative for the following reasons.

[18] The defendant's right to exclusive use and occupation of the licensed areas is not an unalienable right to the land and it is subject to that of the state for clearly the licensed areas are state

land. The state authority has deemed it fit to issue a quarry licence to the plaintiff and one cannot expect the quarry operation in the licensed areas to be conducted without any road access. The decision of the Director of Forests to allow access to the quarry through the defendant's land is not unlike the granting of a right way into a landlocked piece of land - the rationale simply is one of a justice to the owner of the landlocked land for without it the owner's land would be completely useless. The same goes for the plaintiff in this case. What good would be their quarry licence without the road? The Director of Forests in his letter granting the permission to the plaintiff to build the road was being fair and reasonable. He said the defendant could use the road also. The defendant themselves admitted that the people of Belaga in that area was also using the road. So it looks to me that the decision of the Director of Forests was made for the greater good of the greatest number of people, a principle of jurisprudence which should be upheld in this case.

[19] Thus, even on the merits of the application, I still believed that the defendant's insistence on an exclusive use and occupation of the land to the exclusion of the plaintiff is without basis and I dismissed their application with costs to the plaintiff to be taxed unless agreed.